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No. 96-1785

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DISCON INCORPORATED,

Cross-Petitioner,

vs.

NYNEX CORPORATION, NYNEX MATERIEL ENTERPRISES COMPANY, NEW YORK TELEPHONE COMPANY, ROBERT J. ECKENRODE, and BERNARD O'REILLY,

Cross-Respondents.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CROSS-PETITIONER'S REPLY BRIEF

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CROSS-PETITIONER'S REPLY BRIEF

1. Cross-Respondents Have Failed To Rebut Discon's Showing that the Decision of the Court Below Conflicts with the Decisional Law of Nine Other Circuits

Discon's Conditional Cross-Petition ("Cross-Pet.") showed (at 6-9. n 2), that under the clear decisional law of nine Circuit Courts of Appeal, in conflict with the decision of the court below, the individual cross-respondents, Robert J. Eckenrode, an officer of cross-respondent NYNEX Corp., and Bernard O'Reilly, a district manager of cross-respondent MECo, would be held to be distinct from the "enterprise" defined in Discon's Amended Complaint and, accordingly, that they would be subject to liability in those nine Circuits.

The Brief in Opposition ("Br. Opp.") of cross-respondents NYNEX Corp. MECo, NYTel and Eckenrode ("NYNEX") discusses only one of the sixteen cases that Discon cited in this connection, and even as to this one case, *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258 (3d Cir. 1995), NYNEX does not claim that it does not conflict with the decision of the court below but rather that it was wrongly decided. *See*, Br. Opp. 8 n 6.[1]

Instead, NYNEX asserts that "in actuality, the holding of the court below is consistent with the weight of authority in the Circuits that have addressed this issue" (Br. Opp. 7). However, in seven of the ten cases that NYNEX cites as direct support for this assertion (Br. Opp. 7-8, n 4), there were no individual defendants at all.[2]

Of the three remaining cases cited by NYNEX, one explicitly states that "the defect in proving the existence of

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[1] NYNEX string cites several of the cases cited by Discon, but only for the undisputed proposition that the "person" alleged to be liable for conducting the affairs of an enterprise through a pattern of racketeering activity must be distinct from that enterprise. *See*, Br. Opp. 6.

[2] *See*, *Compagnie de Reassurance d'Ile de France* v. *New England Reinsurance Corp.*, 57 F.3d 56 (1st Cir.), *cert. denied*, 116 S. Ct. 564 (1995); *NCNB Nat'l Bank* v. *Tiller*, 814 F.2d 931 (4th Cir. 1987); *United States* v. *Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983); *Parker & Parsley Petroleum Co.* v. *Dresser Indus.*, 972 F.2d 580 (5th Cir. 1992); *Atkinson* v. *Anadarko Bank & Trust Co.*, 808 F.2d 438 (5th Cir.) (*per curiam*), *cert. denied*, 483 U.S. 1032 (1987); *Puckett* v. *Tennessee Eastman Co.*, 889 F.2d 1481 (6th Cir. 1989); *Richmond* v. *Nationwide Cassel L.P.*, 52 F.3d 640 (7th Cir. 1995).

a 'person' separate from the 'enterprise' is *not* present with respect to [the individual defendant]," *Board of County Comm'rs of San Juan County* v. *Liberty Group*, 965 F.2d 879, 886 (10th Cir.), *cert. denied*, 506 U.S. 918 (1992) (emphasis supplied); one upheld the dismissal of a § 1962(c) claim against the individual defendants solely because those very defendants were also individually named as part of the "enterprise" alleged, *see*, *Odishelidze* v. *Aetna Life and Casualty Co.*, 853 F.2d 21 (1st Cir. 1988); and the third affirmed the dismissal of the complaint, but with leave to replead, because the court found it impossible to ascertain what the alleged "enterprises" comprised, *see*, *Old Time Enterprises, Inc.* v. *International Coffee Corp.*, 862 F.2d 1213, 1217 (5th Cir. 1989).

The lesson of the cases cited by NYNEX is that a separate RICO "enterprise" is not demonstrated merely by showing that a corporate defendant (or other entity) committed a pattern of predicate acts in the conduct of its own business. *See*, *Board of County Comm'rs of San Juan County* v. *Liberty Group*, 965 F.2d, *supra*, at 885; *Old Time Enterprises, Inc.* v. *International Coffee Corp.*, 862 F.2d, *supra*, at 1217; *Parker & Parsley Petroleum Co.* v. *Dresser Indus.*, 972 F.2d, *supra*, at 583; *Puckett* v. *Tennessee Eastman Co.*, 889 F.2d, *supra*, at 1489. Accordingly, a defendant corporation would not be distinct from an "enterprise" defined solely as that corporation and a number of its employees. The converse, however, is not true. As the cases cited in the Cross-Petition show, individual defendants are routinely held to be distinct from an "enterprise" defined as the company that employs them because, in such cases, the defendants are charged with operating not their own, but the company's, affairs through a pattern of racketeering activity. Thus, the cases cited by NYNEX do not support the decision of the court below. Nor

does any of those cases contradict the holdings of the cases cited by Discon under which the individual cross-respondents, Eckenrode and O'Reilly, would be held distinct from the "enterprise" defined in Discon's amended complaint.

In a separate Brief in Opposition, Cross-Respondent O'Reilly claims that as a person acting within the scope of his employment, as a "mere employee" of cross-respondent MECo, he should not be subjected to liability under § 1962(c) because, he asserts, in *Reves* v. *Ernst & Young*, 507 U.S. 170 (1993), this Court limited the reach of such liability to persons having "some part in directing the affairs of the alleged enterprise" (O'Reilly Br. Opp. 15). Cross-respondent O'Reilly, however, was alleged to have been a district manager of MECo (Joint Appendix ("J.A.") 116), and this Court stated in *Reves* that an enterprise is "'operated' not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management," *Reves*, at 184 (footnote omitted). In any event, the question of whether, as O'Reilly claims, he acted solely within the scope of his employment in his dealings with Discon is, of course, a matter for proof at trial.

(Cross-respondent O'Reilly also argues that he is not a proper party respondent. While acknowledging that "[u]nder Rule 12.5" he was "fairly put to the jeopardy" of being named as a respondent to a Conditional Cross-Petition, he argues that he escaped that jeopardy because Discon was "plainly noticed that O'Reilly was neither a Petitioner nor a remaining interested party in accordance with Rule 12.6" [O'Reilly Br. Opp. 9]. However, O'Reilly acknowledges that the first such notice was contained in the NYNEX petitioners' opening brief. *Id.* By the time that that brief was

served on Discon, Discon's time to file an opening petition against O'Reilly had, of course, elapsed. Thus, the logical and practical conclusion of O'Reilly's argument is that a party, like Discon, that does not intend to seek review of the decision of the Court of Appeals unless the other side seeks such review, would have to file an opening petition defensively against all parties on the other side, in order to guard against the possibility that some, but not all, of those parties will seek review by this Court. This conclusion would render the provision for filing conditional cross-petitions pursuant to Rule 12.5 nugatory in cases with multiple parties.)

The Cross-Petition also showed that the holding of the court below that cross-respondents NYTel and MECo are not distinct from the "enterprise" defined in the amended complaint conflicts with the holding of the Seventh Circuit that a subsidiary is distinct from its parent corporation, *see, Haroco, Inc.* v. *American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984), *aff'd per curiam*, 473 U.S. 606 (1985), and is at odds with the reasoning of the Seventh Circuit, adopted in *haec verba* by the Courts of Appeal for the Third and Ninth Circuits, *viz.*, that "the only important thing" is that the enterprise be either formally or practically separable from the defendant. *McCullough* v. *Suter*, 757 F.2d 142, 144 (7th Cir. 1985). *See*, Cross-Pet, 8-9.

Again, none of the cases cited by NYNEX weighs against this showing. Only four of those cases involved a subsidiary and its parent or affiliate. Of those, one, *United States* v. *Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983), held that an *unincorporated* division of a corporation is not distinct from that corporation; one, *Compagnie de Reassurance d'Ile de*

France v. *New England Reinsurance Corp.*, 57 F.3d 56 (1st Cir.), *cert. denied*, 116 S.Ct. 564 (1995), held that an entity that was initially an unincorporated division and then became a separately incorporated subsidiary of a corporation was not distinct from that corporation where all of the subsidiary's employees were, in fact, employees of the parent corporation and where there was "no evidence whatsoever [that the subsidiary] took any actions independent of its parent," 57 F.3d at 92; one, *Atkinson* v. *Anadarko Bank & Trust Co.*, 808 F.2d 438 (5th Cir.) (*per curiam*), *cert. denied*, 483 U.S. 1032 (1987), merely held that there was no evidence of any activity on the part of the alleged enterprise other than the activity of the named defendant and, accordingly, that there was no association in fact. Here, of course, cross-respondents NYTel and MECo are both legally and practically distinct from the "enterprise" alleged, and, as shown in the Cross-Petition, it was precisely the separate legal existence of NYTel as a regulated company with captive customers that was the linchpin of the activities complained of.

Only one case cited by NYNEX is even arguably consistent with the decision of the court below on this point. In *NCNB Nat'l Bank* v. *Tiller*, 814 F.2d, *supra*, the Fourth circuit held, on the basis of its earlier holding in *United States* v. *Computer Sciences Corp.*, 689 F.2d, *supra*, that a bank was not distinct from its parent holding company. But the existence of one case that is arguably consistent with the decision of the court below hardly diminishes the conflict shown between the decision of the court below as to the corporate cross-respondents and the decisional law of, at least, the Third, Seventh and Ninth Circuits.

NYNEX's final argument on this question, *viz.*, that

if Discon's view prevails "then all a plaintiff would need to do in order to circumvent the distinctiveness requirement...in any claim against a corporation would be to name as a defendant at least one employee or subsidiary of defendant corporation" (Br. Opp. 9), simply makes no sense. The addition of defendants can have no bearing on whether a particular defendant corporation (or individual) is distinct from the "enterprise" that is alleged, because whether a defendant is distinct from the "enterprise" must be determined for each defendant separately. *See, e.g., Schreiber Distributing Co.* v. *Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1398 (9th Cir. 1986) (error to dismiss as to two individual defendants because other defendants not distinct from "enterprise"). For this reason, cross-respondent O'Reilly's apparent argument that *he* is not distinct from the "enterprise" because co-respondent MECo was both named as a defendant and included as an element of the association in fact "enterprise" must also fail (O'Reilly Br. Opp. 17).[3]

2. The Alternative Theories Argued by Cross-Respondent, which Were Not Decided by the Court of Appeals, Cannot Support the Judgment Below.

NYNEX argues that the judgment below can be supported by the holdings of the District Court that Discon

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[3] What cross-respondent O'Reilly states, however, is that he is not distinct from the "enterprise" alleged because both he and MECo are defendants.

O'Reilly does not claim, as indeed he cannot, that he was individually named as an element of the "enterprise." The phrase, "attorneys, accountants and other agents whom NYNEX has engaged," (J.A. 152 ¶ 115) plainly does not include the corporate defendants' employees.

failed to allege either predicate acts or injury to its business as a result of such predicate acts (Br. Opp. 9-12). Because those holdings are plainly wrong, NYNEX's argument must fail.

A. Discon Sufficiently Alleged Predicate Acts.

The District Court held that Discon's allegations of mail and wire fraud failed to meet the particularity requirements of Fed. R. Civ. Pro. 9 (Pet. 40a-42a).[4] However, with regard to each allegation of mail or wire fraud, the Amended Complaint and the RICO Case Statement specified from whom and to whom each communication was alleged to have been mailed or wired, the date, or the approximate date of such mailing or wiring, the content of the communication, which of the communications were alleged to be deceptive, what the deception was, and the role that the deceptive communication played in the scheme by which Discon was injured. *See*, J.A. 134-139, ¶ 73; 153, ¶ 124.[5]

The District Court also held that all but one of Discon's allegations of extortion were time barred because they were alleged to have occurred more than four years before Discon filed suit (Pet. 44a-45a). However, the four

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[4] References denoted "Pet. -a" are to the Appendix bound with NYNEX's opening Petition.

[5] NYNEX's suggestion (Br. Opp. 4, n 2; 10, n 9) that Discon's allegations of fraud are somehow weakened by Discon's "admi[ssion]" that NYTel got caught by both the FCC and the New York Public Service Commission and was required by both to make at least partial restitution to the ratepayers whom NYNEX had defrauded is both irrelevant here, because it pertains to the merits, and odd, to say the least.

year statute of limitations governing RICO actions requires that suit be brought within four years after the injury for which recovery is sought is discovered or discoverable, not within four years of the earliest predicate act. *Bingham* v. *Zolt*, 66 F.3d 553 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 1418 (1996). Indeed, the RICO Act provides that a RICO claim must be predicated on "at least two acts of racketeering activity, [...] the last of which occurred within ten years [...] after the commission of a prior act of racketeering." 18 U.S.C. § 1961(5). Thus, even if the injury for which recovery is sought is discovered on the day that the last predicate act is committed, the preceding predicate act need only have occurred within the last ten years. Each act of extortion that Discon alleged was alleged to have occurred no more than six and a half years prior to the filing of the complaint. *See*, J.A. 124, ¶ 38; 125-126, ¶ 44; 127, ¶ 50; 129, ¶ 56; 140, ¶ 75. Thus, none was time barred.

B. Discon Alleged that It Had Been Injured by the Predicate Acts Alleged.

Discon plainly alleged injury to its business as a result of the predicate acts alleged. *See*, *e.g.*, J.A. 124, ¶ 38 (extortionate demand by cross-respondent O'Reilly to put Discon out of business unless Discon agreed not to bill for job changes); J.A. 125-26, ¶ 44 (extortionate threat by cross-respondent O'Reilly to put Discon out of business unless Discon withdrew from bidding on a NYTel job); J.A. 126, ¶ 45 (Discon's withdrawal from bidding resulted in exclusion from all NYTel requests for proposals in the mid-Hudson region); J.A. 127, ¶ 50 (threat by cross-respondent NYTel to report unfavorably on Discon unless Discon agreed to defame a MECo employee; J.A. 153, ¶ 124 (report was basis for dropping Discon from list of approved vendors to MECo or NYTel); J.A. 129, ¶ 56 (extortionate demand by cross-

respondent MECo, refused by Discon, that Discon surrender all physical evidence of MECo's illegal markups as condition of being given work again); J.A. 153, ¶ 124 (fraudulent concealment of Discon's low prices to MECo from Discon's ultimate customer and from N.Y. Public Service Commission prevented Discon from enlarging market share).

CONCLUSION

For the reasons given above and in the Conditional Cross-Petition, the Cross-Petition should be granted if the opening Petition is granted.

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